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In the Supreme Court
of the United States
OCTOBER TERM, 1969

No. 1433

NATHAN ZUSMAN,
Petitioner,

v.

THE STATE OF OREGON,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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2. Whether ORS 167.120 on its face and as applied in this case violates Due Process because it dispenses with mens rea as a constituent of the offense?

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NATHAN ZUSMAN,

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v.

THE STATE OF OREGON,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

Petitioner, Nathan Zusman, respectfully prays for a Writ of Certiorari to the Court of Appeals of the State of Oregon in order to review its judgment affirming a conviction and sentence of petitioner for violation of Oregon Revised Statutes 167.120, and declining to consider its constitutionality.

The Supreme Court of Oregon denied petitioner's application for a hearing. Under Oregon law, a hearing by the state Supreme Court after a decision of the Court of Appeals is allowed whenever three or more judges of the Supreme Court vote to allow it. ORS 2.520(1).

This Court's writ is properly directed, therefore, to the Court of Appeals of the State of Oregon

OPINION BELOW

The opinion of the court below is reported in Vol. 89, Oregon Advance Sheets, page 601, 460 P2d 872. Said opinion is appended hereto as Appendix "A." The Supreme Court of Oregon rendered no opinion in entering an order denying a hearing.

JURISDICTION

The judgment sought to be reviewed was entered November 7, 1969. A timely petition for rehearing was denied December 10, 1969. The order of the Supreme Court of Oregon denying a hearing was entered January 20, 1970.

This Court has jurisdiction to review the judgment in question by writ of certiorari under the provisions of 28 U.S.C. 1257(3), because the validity of an Oregon Statute, Vol. 1, Oregon Revised Statutes, § 167.120, is drawn in question on the ground of its being repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW

1. Whether ORS 167.120, on its face and as applied in this case, violates the Due Process clause of the Fourteenth Amendment on the ground of being vague, indefinite and uncertain.

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2. Whether ORS 167.120 on its face and as applied in this case violates Due Process because it dispenses with *mens rea* as a constituent of the offense?

STATUTE INVOLVED

ORS 167.120 provides:

> 167.120. *Living with, receiving earnings of, or soliciting for a prostitute.* Any person who lives in or about a house of ill-fame, or habitually associates with or lives off of a common prostitute, or receives from a common prostitute any part or all of her earnings, or solicits or attempts to solicit any male person to have sexual intercourse with a prostitute, shall be punished upon conviction by imprisonment in the penitentiary for not more than 15 years. In all prosecutions under this section common fame is competent evidence in support of the indictment.

Note. [ORS 167.120 was amended by Chapter 404, Oregon Laws 1969. Amendment not applicable.]

STATEMENT OF THE CASE

This case is before the Court on the statute and Count II of the indictment. Petitioner was indicted in the Circuit Court of Oregon for violation of ORS 167.125 and ORS 167.120, and charged as follows:

> The said NATE ZUSSMAN (sic) on or about the 19th day of August, A.D. 1967, in the County of Multnomah and State of Oregon, did unlawfully, feloniously and knowingly persuade, induce, entice and coerce a certain female person,

to-wit, one Joan Marie Bible, to engage in the practice of prostitution, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon. (ORS 167.125)

COUNT II

Further for and as a part of the same act and transaction alleged and hereinabove set forth in Count I of this indictment and connected therewith, the said NATE ZUSSMAN (sic) is accused by the Grand Jury of the County of Multnomah and State of Oregon, by this indictment, as hereinafter set forth in this said count, of the crime of

RECEIVING THE EARNINGS OF A COMMON PROSTITUTE

committed as follows:

The said NATE ZUSSMAN (sic) on or about the 19th day of August, 1967, in the County of Multnomah and State of Oregon, did unlawfully and feloniously receive from one Joan Marie Bible, a common prostitute, money of the United States of America, which said money of the United States of America had theretofore been earned by the said Joan Marie Bible in the practice of common prostitution contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

In a trial before a court and jury, petitioner was found guilty on both counts and sentenced to imprisonment for three years on Count I, and pay a fine of $5000; that he be imprisoned for three years on Count II, to run concurrently with the sentence on Count I.

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REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The federal questions sought to be reviewed were raised by Assignment of Error No. II in petitioner's opening brief filed in the Court of Appeals, page 20, upon the grounds, the indictment did not state facts sufficient to constitute a crime because of the statute's vagueness, indefiniteness and uncertainty, and absence of *mens rea* as a constituent of the offense. The Court of Appeals declined to consider the constitutionality of the statute, saying:

> ". . . Challenges to the constitutionality of a statute should be raised in the trial court, and not for the first time on appeal. . . ."

Under Oregon law, the objection that an indictment fails to state facts sufficient to constitute a crime may be raised for the first time in the Court of Appeals or Supreme Court. *State* v. *Peebler*, 200 Or. 321, 265 P.2d 1081.

Furthermore, the Oregon Supreme Court has held that a constitutional question not raised in the trial court will not be considered for the first time on appeal is not inflexible, where the record from the trial court affords a basis for a finding that a challenged act invades some constitutional right. *State Highway Commission* v. *Helliwell*, 225 Or. 588, 591, 358 P.2d 719, 721. Compare, *Wright* v. *State of Georgia*, 373 U.S. 284.

It is submitted that, in addition to the foregoing rules, in declining to consider the constitutionality

of the statute, state appellate judges violate their oaths of office to support the Constitution as demanded by Article VI, Constitution of the United States,[1] because a statute that violates the Constitution is invalid and unenforceable whenever its validity is challenged. Appellate judges are not empowered to summarily refuse to consider the constitutionality of a statute where there is a basis that it invades a substantial right.

Whether a federal question was sufficiently raised in the state court is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts. *Street* v. *New York*, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 1354.

ARGUMENT AMPLIFYING THE CONSTITUTIONAL REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Point I

The statute is vague and uncertain and indefinite.

The principle that a statute which is vague, indefinite, uncertain or which furnishes no reasonably ascertainable standard of guilt is violative, in the case of a state statute, of the Due Process clause of the Fourteenth Amendment, is well known. This Court has spoken on that score many times. The crucial

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[1] Article VI, Constitution of United States:

* * * (T)he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution; * * *

question in every case is, of course, whether the particular statute in question falls within or without the ban. It is petitioner's contention that the statute here being considered falls within the ban and that the court below, in failing to so hold, acted contrary to many decisions of this Court which have spelled out the rules that: the crime must be defined with appropriate definiteness; there must be ascertainable standards of guilt; no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes; all are entitled to be informed as to what the state commands or forbids; a statute which either forbids or requires the doing of an act in terms so vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law; the statute must be certain both with regard to the person included within its scope and in regard to the applicable tests to ascertain guilt.[2]

And the enactment is to be tested on its face.

> "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."

Tested against these rules, petitioner submits that the enactment here falls afoul of the due process guarantee.

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[2] *Connally* v. *General Construction Co.*, 269 U.S. 385, 391-393; *United States* v. *Brewer*, 139 U.S. 278, 288; *Musser* v. *Utah*, 333 U.S. 95, 96, 97; *Winters* v. *New York*, 333 U.S. 507, 515; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453; *Baggett* v. *Bullitt*, 377 U.S. 360; *Giaccio* v. *Pennsylvania*, 382 U.S. 399.

Thus the statute makes criminal and imposes up to 15 years imprisonment for:

> "Any person who . . . receives from a common prostitute any part or all of her earnings . . ."

In considering Count II alone, it charges petitioner in the general language of the statute with receiving from a prostitute money of the United States which had heretofore been earned by her in the practice of common prostitution.

Any person can be charged with similar conduct if the prosecutor is privileged to prepare an indictment in the literal language of the statute. Any person can admit the truth of the allegations and yet be innocent of a crime. The burden of proof of innocence under the allegations of the indictment is shifted to the accused to prove that any United States money received is not "tainted." For example, if a merchant sells a garment to a prostitute and receives United States money in payment, under the plain words of the statute, a prima facie case of strict criminal liability results from his conduct.

Hence the mere receipt of any part of the earnings of a prostitute, however innocent, and in light of a mistake of fact, nonetheless, creates a strict criminal liability. If the ordinary receipt of United States money from a prostitute without any evil intentions or corrupt purposes is, ipso facto, "tainted" money creating a strict criminal liability, not only a merchant, but a solicitor for charity—a banker who receives some of her earnings in payment of a loan—

a lawyer or doctor who is paid for professional services rendered, stand at the gates of penal jeopardy. Compare, *State* v. *Lund*, 75 Utah 559, 286 P. 960; *State* v. *Govan*, 123 N.W.2d 110 (N.D.); *State* v. *Green*, 70 N.D. 722, 724, 297 N.W. 783, 785.

And, assume, arguendo, a common prostitute is found guilty of prostitution and fined $100? When she walks from the courtroom to the court clerk and pays her fine, under the precise language of the statute, the clerk, prima facie, is guilty of a felony!

Such words as "Any person . . . who receives from a common prostitute any part or all of her earnings" at once make inevitable speculation as to what is meant. We do not believe we are overstating the case in contending that reasonable men can differ on a mistake of fact as to what may be the lawful earnings of a woman and what may be the "tainted" earnings of a prostitute.

By the language of the statute, any person who receives any money from a prostitute under any and all circumstances, is required to determine at his peril whether her money was earned in a lawful manner or whether it is her earnings from prostitution. Honest and intelligent men may reasonably have contrary views whether or not a prostitute's money will burn any person whom it touches when it touches them under any and all circumstances. C.f., *People* v. *Jelke*, 1 N.Y.2d 321, 135 N.E.2d 213.

It is submitted, the terms of ORS 167.120 are so broad, uncertain and ambiguous that their applica-

tion in a normal nondiscriminatory way violate the individual's constitutional right to receive United States money from any person in exchange for a lawful consideration. The terms of a penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.

Point II

The statute violates Due Process because it dispenses with mens rea as a constitutent of the offense.

A further reason for allowance of the writ is that the statute excludes any element of *mens rea*. A penal or *malum in se* statute is offensive to the Due Process requirement by eliminating *mens rea* as an essential element. *Smith* v. *California*, 361 U.S. 147; *Morissette* v. *U. S.*, 342 U.S. 246.

One of the strongest disputable presumptions known to the law is the presumption that a person is innocent of crime, which presumption requires the state to carry the burden of establishing all material elements of the crime with which the accused is charged. The accused may stand on this presumption of innocence withholding all proof until the prosecution has established a complete case. This presumption is a presumption of law, a legal inference, based on the fact that the great majority of people are not criminals; it is a shield which the law, in abhorrence of the conviction of the innocent, throws around every citizen.

Here the statute creates strict criminal liability in the ordinary act of receiving United States money from a prostitute. The offense depends on no mental element, but consists only of a forbidden act. The clear effect of such a construction makes it capable of an unconstitutional application. The element of *mens rea* not made a constituent of the offense results in a judicial presumption of guilt against the accused. This judicial presumptive intent absolutely conflicts with the overriding presumption of innocence with which the law endows the accused. Compare *Morissette* v. *U.S.*, 342 U.S. 246; *A Rationale of Mens Rea*, 52 Har. L. Rev. 905.

Morissette involved a violation of 18 U.S.C. § 641, making it a criminal offense to embezzle, steal, purloin or knowingly convert government property. The trial court refused to submit, or to allow the accused's counsel to argue to the jury whether the accused acted without wrongful or criminal intent, and instructed the jury to the effect that lack of criminal intent was no defense. In reversing, this Court held that criminal intent was an essential prerequisite of criminal liability and that the existence of such intent was not to be presumed as a matter of law, but was to be found by the jury upon a consideration of all the circumstances, rather than upon the isolated act of taking.

Here the Oregon Court gave an unconstitutional application to the statute by holding, in effect, that *mens rea* is not an essential element:

". . . The instruction requested by the defendant would have required the state to prove the existence of an agreement between the defendant and the prostitute. While the jury could well have found such agreement to exist in this case, that is not an essential element of the crime. The instruction was properly refused. . . ."

CONCLUSION

The Oregon Court ignored the rule that the statute is to be tested on its face and not by the accusation under it, nor by the proof under the charge. The statute as written makes criminal an innocent act of receiving money from a prostitute and regardless of the existence of any criminal intent. The statute is vague, indefinite and uncertain and does not measure up to constitutional requirements.

The Petition for Writ of Certiorari to the Court of Appeals of Oregon should be granted.

Respectfully submitted,

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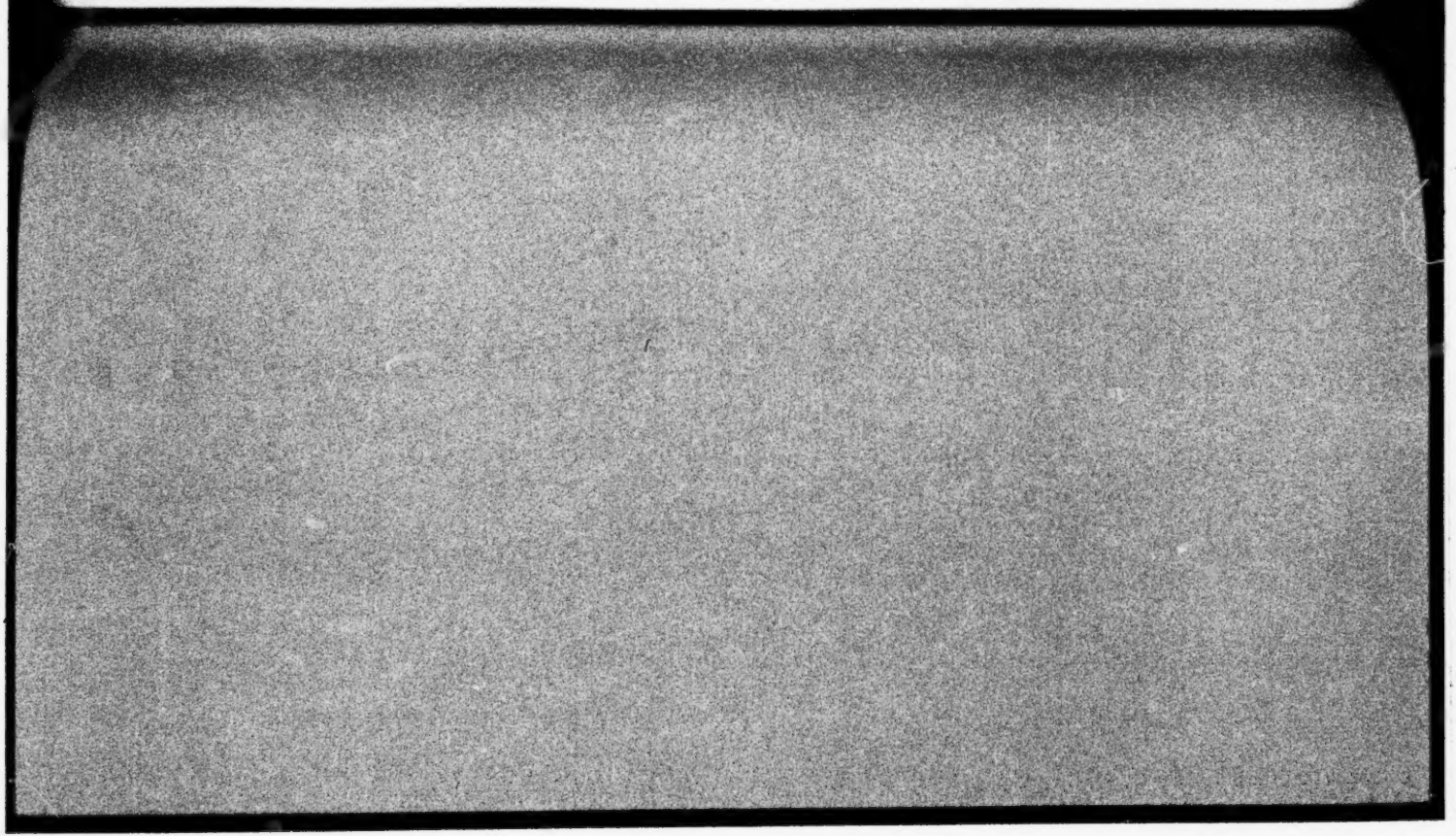

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF OREGON

IN BANC

STATE OF OREGON, *Respondent, v.*
NATHAN ZUSMAN, *Appellant.*

Appeal from Circuit Court, Multnomah County.

ALAN F. DAVIS, Judge.

Argued and submitted September 15, 1969.

Leo Levenson, Portland, argued the cause and filed the briefs for appellant.

Jacob B. Tanzer, Solictor General, Salem, argued the cause for respondent. With him on the brief was George Van Hoomissen, District Attorney, Portland.

AFFIRMED.

BRANCHFIELD, J.

The defendant was convicted of the crimes procuring a female to engage in prostitution, (ORS 167.125), Count I of the indictment, and of receiving the earnings of a common prostitute (ORS 167.120), Count II. He has appealed, alleging as his first assignment of error the refusal of the trial court to instruct the jury that "* * * this defendant entered into an agreement to accept her earnings from prostitution, * * *."

The Oregon Supreme Court has had occasions to

examine prior convictions under ORS 167.120 and in the case of *State* v. *Goesser*, 203 Or 315, 280 P2d 354 (1955), set forth the essential elements of the crime. In addition to the time and place of the alleged crime, the elements of the crime charged are that the named woman was a common prostitute, and that some of her earnings as a prostitute were received by the defendant.

The actions of the defendant herein clearly come within the proscriptions of ORS 167.120 as construed in *Goesser*. The instruction requested by the defendant would have required the state to prove the existence of an agreement between the defendant and the prostitute. While the jury could well have found such agreement to exist in this case, that is not an essential element of the crime. The instruction was properly refused.

Defendant argues that the instruction should have been given in order for his theory of the case to be considered by the jury. *State* v. *Patterson*, 117 Or 153, 154-5, 241 P 977 (1925), says:

> "* * * It is true that a defendant is entitled to have his theory of the case presented to the jury, with appropriate instructions, but it must be one which is well grounded in law if true.***"

Since defendant's requested instruction was not based upon the law, it was not a proper vehicle for presentation of his theory to the jury.

Defendant now claims that Count II of the indictment does not state facts sufficient to constitute a

crime and that ORS 167.120 violates constitutional due process because it does not require allegation of *mens rea* or scienter. These objections were not raised in the trial court.

The objection that an indictment fails to state facts sufficient to constitute a crime is never waived; it may be raised for the first time in this court or in the Supreme Court. But where the question is first raised in an appellate court, the allegations of the indictment are to be liberally construed in favor of the validity of the indictment. *State v. Goesser*, supra.

The indictment informed defendant with certainty as to the crime charged and as to what he must defend against. It contained the name of the prostitute whose earnings he was accused of receiving and told him the date and place of the alleged receipt of such earnings. The indictment included all essential elements of the crime.

Challenges to the constitutionality of a statute should be raised in the trial court, and not for the first time on appeal. *State v. Krause*, 87 Or Adv Sh 235, — Or —, 445 P2d 500 (1968). *Highway Commission* v. *Helliwell*, 225 Or 588, 358 P2d 719 (1961), *Senger v. Vancouver-Portland Bus Co.*, 209 Or 37, 298 P2d 835, 304 P2d 448 (1956).

The other issues raised in this court were not presented to the trial court and will not be considered here. *State v. Hollman*, 87 Or Adv Sh 307, — Or —, 446 P2d 117 (1968). Employment of different counsel on appeal is not cause for relaxation of that rule.

The judgment is affirmed.